EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
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LEXINGTON INSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Plaintiffs,

-against- 04-11109 (RGS)

VIRGINIA SURETY COMPANY,

Defendant.
-----------------------------------x

July 31, 2006

10:10 a.m.

Deposition of CHARLES J. MESSERY, pursuant to notice, at the offices of Mintz, Levin, Cohn, Ferris Glovsky and Popeo, PC, 666 Third Avenue, New York, New York, before Gail F. Schorr, a Certified Shorthand Reporter, Certified Realtime Reporter and Notary Public within and for the State of New York.

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a million dollar policy for?

A. Yes.

Q. And what type of company was the single insured?

A. A real estate portfolio. It was a real estate owner.

Q. So a company that owned a lot of real estate?

A. Yes, real estate owner/manager.

Q. These were residential properties?

A. Yes, mainly.

Q. And they wanted a million dollar policy?

A. Yes.

Q. Did they tell you that that was to replace a policy that they had previously had with another carrier?

A. At that time, I'm not sure.

Q. And you responded, we can't do a million dollar policy?

A. Right. No, my response was we couldn't do a million dollar first

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dollar policy.
Q. And was that something you knew right off the bat --
A. Yes, because --
Q. Let me finish. Was that something you knew as soon as they made the request or did you have to evaluate it and go to your management?
A. No, I knew it as soon as they made the request.
Q. Why is that?
A. Lexington doesn't write first dollar real estate business.
Q. So as a matter of policy they wouldn't do it?
A. Yes.
Q. Why is that?
A. There's too much frequency and they want to be on an excess layer to be excess of the burn layer they call it. The burn layer is the frequency piece of it, so you want to choose an attachment point that is high enough you're not going to be hit on

every slip and fall losses, you're there for catastrophic losses.

Q. Why is that?

A. You can't make money off of it.

Q. So the idea was if we have first dollar coverage we're going to have to defend and handle every slip and fall claim?

A. Yes. You'd never be able to collect enough premium to pay out your losses.

Q. And so how did you in this case deal with that?

A. So we told them that the only way we'd look at the account is if we were excess of a $250,000 SIR.

Q. What is an SIR?

A. Self insured retention.

Q. And what does that mean?

A. It means that the insured's responsible for the first $250,000 and then the insurance carrier sits excess of the SIR.

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sitting over the stand alone you'd be expected to identify the primary?

A. Yes, definitely.

Q. So if you had a -- in this case did you have umbrella coverage above the Lexington piece?

A. I don't know.

Q. Based on your understanding of the way the industry works, would you expect --

A. Yes.

Q. -- the umbrella carrier to identify all the underlying insurance policies?

A. Oh, yes, sure.

Q. In any event, they were seeking a primary policy and you ended up writing a policy that was excess of an SIR?

A. Yes.

Q. It was not excess of any specific insurance policy, was it?

A. We knew it was going to be excess of an insurance policy. We

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didn't know whose policy it was going to be. We knew it was going to be called an SIR buy-back.

Q. But at the time you issued the -- in terms of the form that you used, that form did not identify a specific primary insurance policy?

A. Right.

Q. Instead, you used an endorsement, an SIR endorsement?

A. We did use one, yes.

Q. Let's go back to chronologically. You've told them we're not going to write this primary policy with first dollar coverage. First Capital comes to you, what did they seek?

A. At that time they knew we wouldn't do a primary policy, and then we really -- we weren't going to quote it because if you're in the industry you know that a real estate portfolio is not going to take a big SIR by itself because there's all these

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different entities that pay premium, and you can't possibly allocate SIRs. They want an ultimate cost program.

So if they weren't going to accept the 250 SIR, which we didn't think that was likely, we're not going to do first dollar, we wouldn't be able to quote the account. And that's when they said don't worry about it, we're going to get another carrier to write that first 250 and then you would be excess of that. So at that point we knew it was an option, it was viable to do.

Q. At the time that First Capital brought you the account for the very first policy that was issued were you aware of their intent to get a primary policy?

A. Yes.

Q. Did you know who the primary carrier would be?

A. Not at that time, I don't think.

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Q. When I say primary carrier you're referring to a policy that would cover the retention?

A. Yes.

Q. Did you know what the terms of that policy would be?

A. No.

Q. Did you have any idea who the carrier was?

A. Tell you the truth, I'm not sure what I knew.

Q. Do you believe at the time the first policy was issued on this program that you knew who the carrier within the retention layer was?

A. I really don't know.

Q. Are you familiar with programs generally where a retention is insured?

A. Say that again.

Q. Well you referred earlier to something called a buyback?

A. Yes.

Q. What's a buyback?